CREDIT GUARANTEE CORPORATION MALAYSIA BHD v. SUPERMANIAM SELITAN

HIGH COURT MALAYA, JOHOR BAHRU
EVROL MARIETTE PETERS JC
[BANKRUPTCY NO: JA-29NCC-1973-10-2019]
17 FEBRUARY 2021

BANKRUPTCY: *Notice – Setting aside – Appeal against – Judgment-in-default recorded against judgment debtor as guarantor for loan – Whether judgment predicated on letter of guarantee – Whether proper redress would be for judgment debtor to apply to set aside judgment – Whether judgment debtor could resist bankruptcy proceedings*

BANKRUPTCY: *Proceedings – Bankruptcy notice – Judgment-in-default recorded against judgment debtor as guarantor for loan – Whether judgment predicated on letter of guarantee – Whether proper redress would be for judgment debtor to apply to set aside judgment – Whether judgment debtor could resist bankruptcy proceedings*

CIVIL PROCEDURE: *Judgments and orders – Judgment-in-default – Judgment-in-default recorded against judgment debtor as guarantor for loan – Whether judgment predicated on letter of guarantee – Whether proper redress would be for judgment debtor to apply to set aside judgment – Whether judgment debtor could resist bankruptcy proceedings*

This was an appeal by the judgment creditor ('JC') against the decision of the Senior Assistant Registrar ('SAR') in allowing the judgment debtor's ('JD') application to set aside the bankruptcy notice. A judgment-in-default ('the judgment') was recorded against the JD, a guarantor for a loan given to the borrower, one Tat Hock Industrial Sdn Bhd. The letter of guarantee was signed on 29 October 2001. Based on the judgment, bankruptcy proceedings were initiated against the JD. A bankruptcy notice was filed and the JC obtained leave of court to proceed against the JD as the guarantor in these bankruptcy proceedings. The JD filed an application to set aside the bankruptcy notice, which was allowed. Hence, this appeal. The issues that arose were (i) whether the JD was liable for the full amount; and (ii) whether the JD was bound by the letter of guarantee.

Held (allowing appeal with costs):

(1) Although judgment was obtained against five guarantors, bankruptcy proceedings were initiated against the guarantors at different times; and this appeal involved only one JD who had applied to set aside the bankruptcy notice. Hence, the principle in *Sumathy Subramaniam v. Subramaniam Gunasegaran & Another Appeal* ('*Sumathy*'), was not

applicable to the facts of the present case. More importantly, the debt in *Sumathy* arose from a friendly loan arrangement which did not stipulate if the guarantors were liable jointly and severally. Although the judgment did not indicate if the defendants were liable jointly and severally, it was crucial to bear in mind that the judgment was predicated on the letter of guarantee. As such, the issue that had to be addressed was what terms and conditions were encapsulated in the letter of guarantee. (paras 10-12)

(2) If the JD's grievance was against the judgment that was ordered against him, the proper redress would have been for him to apply to set aside the judgment, and not to resist the bankruptcy proceedings at this stage, in light of the fact that such proceedings were properly taken out against him. It is not open to the judge in exercising his jurisdiction in bankruptcy proceedings 'to strike out the creditor's petition by disputing the validity of orders made in earlier execution proceedings when the orders had not been set aside particularly so when the respondent had not at any time taken steps to have it set aside'. Since the judgment was never set aside and neither was there evidence of fraud, illegality or coercion, the argument that the JD was unaware of what he had signed was untenable. (paras 18 & 20)

Case(s) referred to:

Alliance Bank Malaysia Bhd v. Mukhriz Mahathir & Anor [2006] 2 CLJ 723 HC ***(refd)***

In Re Dato' Dr Elamaran M Sabapathy; ex p RHB Bank Bhd [2011] 10 CLJ 262 HC ***(refd)***

Malayan Banking Bhd v. Datuk Lim Kheng Khim [1] [1992] 3 CLJ 1449; [1992] 2 CLJ (Rep) 826 HC ***(refd)***

Michael C Solle v. United Malayan Banking Corp Bhd [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267 FC ***(refd)***

OCBC Bank (Malaysia) Bhd v. Lim Hock Kok & Anor [2017] 9 CLJ 454 CA ***(refd)***

Re: Abu Bakar Ismail; Ex-Parte: Alliance Investment Bank Bhd [2011] 1 LNS 1688 HC ***(refd)***

Re: Tioh Ngee Heng; Ex p: Yap Kiu Lian @ Norhashimah Yap (Administratrix Of The Estate Of Mohamad Shariff Hj Hussain) [2000] 1 LNS 197 HC ***(refd)***

Sovereign General Insurance Sdn Bhd v. Koh Tian Bee [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277 ***(refd)***

Sumathy Subramaniam v. Subramaniam Gunasegaran & Another Appeal [2018] 2 CLJ 305 CA ***(dist)***

Yeo Ah Wang v. United Malaysian Banking Corporation [1995] 1 AMR 38 ***(refd)***

For the appellant - Idayu Mohd Yusof; M/s A Rahim & Co

For the respondent - Raman Velu; M/s Raman Velu & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Evrol Mariette Peters JC:

Introduction

[1] This is an appeal ("this appeal") by the judgment creditor against the decision of the Senior Assistant Registrar ("SAR") in allowing the judgment debtor's application to set aside the bankruptcy notice.

The Background Facts

[2] Judgment-in-default ("the judgment") was recorded against the judgment debtor on 6 November 2017 for RM156,782.54 as at 29 February 2016. The judgment debtor in this case was the guarantor for a loan given to the borrower, one Tat Hock Industrial Sdn Bhd. The letter of guarantee was signed on 29 October 2001.

[3] Based on the judgment, bankruptcy proceedings were initiated against the judgment debtor. A bankruptcy notice was filed on 17 October 2019, and on 2 December 2019, the judgment creditor obtained leave of court to proceed against the judgment debtor as the guarantor in these bankruptcy proceedings.

[4] On 28 January 2020, an application was filed by the judgment debtor to set aside the bankruptcy notice. This was allowed by the SAR on 17 August 2020. Hence, this appeal by the judgment creditor.

[5] This appeal was allowed for the following reasons.

Contentions, Evaluation, And Findings

Whether The Judgment Debtor Was Liable For The Full Amount

[6] The gist of this appeal hinged on the issue of whether the judgment creditor was entitled to claim the full judgment sum stipulated in the bankruptcy notice.

[7] The judgment debtor contended that since there were five guarantors altogether, the judgment sum was inaccurate as it should have been divided equally amongst the guarantors, rendering the bankruptcy notice wrong in law. In doing so, the judgment debtor relied on several cases including *In Re Dato' Dr Elamaran M Sabapathy; ex p RHB Bank Bhd* [2011] 10 CLJ 262; *Yeo Ah Wang v. United Malaysian Banking Corporation* [1995] 1 AMR 38, and the Court of Appeal case of *Sumathy Subramaniam v. Subramaniam Gunasegaran & Another Appeal* [2018] 2 CLJ 305.

[8] I was unable to agree with the judgment debtor's contention in view of the fact that there are differences between the facts of the present case and those of *Sumathy Subramaniam v. Subramaniam Gunasegaran* (*supra*), in which it was stated by Mary Lim JCA (as she then was):

> Where the judgment is silent or has not specified that liability is joint and several, the liability is necessarily joint. Where liability is joint, each of the judgment debtor shares the liability equally.

[9] It is pertinent to note that in *Sumathy Subramaniam v. Subramaniam Gunasegaran*, the respondent there had, on the same date, filed two separate bankruptcy notices against both appellants and in each bankruptcy notice, the same judgment sum together with interest and costs, were specified as the unpaid debt. As a result thereof, both appellants had, also on the same date, filed separate applications to set aside the bankruptcy notices, on the same ground. This was explained in the following passage:

> **On 16 November 2015, the respondent filed two separate bankruptcy notices against both appellants. In each bankruptcy notice, the same judgment sum** of RM291,800 together with the sum of RM14,504.85 as interest at the rate of 5% per annum and the sum of RM4,000 as costs, **was specified as the unpaid debt.** The total sum being RM310,304.85.
>
> **On 26 January 2016, both appellants filed separate applications to set aside the bankruptcy notices; the ground relied on however, was the same**; that the sum specified therein was more than what the respondent was legally entitled to under the terms of the summary judgment. The appellants argued that given that the terms of the summary judgment did not specify that the appellants, as judgment debtors were "jointly and severally liable", the judgment debtors must then be equally liable for the judgment sum. In other words, each judgment debtor should only be liable for half of the judgment sum.
>
> (emphasis added)

[10] In this case, although judgment was obtained against all five guarantors, bankruptcy proceedings were initiated against the guarantors (including the judgment creditor) at different times; and this appeal involved only one judgment debtor who had applied to set aside the bankruptcy notice. Hence, the principle in *Sumathy Subramaniam v. Subramaniam Gunasegaran*, was not applicable to the facts of the present case.

[11] Secondly, and more importantly, the debt in *Sumathy Subramaniam v. Subramaniam Gunasegaran*, arose from a friendly loan arrangement which did not stipulate if the guarantors were liable jointly and severally. In this case, the judgment reads as follows:

Tiada Kehadiran telah dimasukkan oleh Defendan-Defendan dalam tindakan ini. Adalah Pada Hari Ini Dihakimi bahawa Defendan-Defendan hendaklah membayar kepada Plaintif seperti berikut:

(a) Keseluruhan jumlah wang terhutang sebanyak RM156,782.54 dikira setakat 29.2.2016;

(b) Faedah pada kadar 6.85% setahun berdasarkan kiraan bulanan dari 1.3.2016 sehingga tarikh penyelesaian penuh;

(c) Kos tindakan ini sebanyak RM1,419.00

[12] Although the judgment did not indicate if the defendants were liable jointly and severally, it is crucial to bear in mind that the judgment was predicated on the letter of guarantee. As such, the issue that had to be addressed was what terms and conditions were encapsulated in the letter of guarantee. In fact, the significance of the terms of the contract, which the loan was based upon, was highlighted in *Sumathy Subramaniam v. Subramaniam Gunasegaran*, indicating that the Court of Appeal would have decided otherwise if the loan agreement in that case had indicated that liability was joint and several:

In any event, there are **no express terms in the loan agreement** indicating that the parties have agreed that the liability of the borrower and the guarantor is joint and several. **It would therefore be contrary to the contractual arrangements** reached between the parties **if this court were to read that the liability of the appellants is joint and several**.

(emphasis added)

Whether The Judgment Debtor Was Bound By The Letter Of Guarantee

[13] Clauses 1 and 28 of the letter of guarantee state:

In consideration of your having opened, opening or continuing an account with and having made making or to make advances loans or otherwise having given credit or accommodation or granting to Tat Hock Industrial Sdn Bhd (376913-T) a company incorporated in Malaysia with its registered office of at Suite 1205A, 12th Floor, Johor Tower 15, Jalan Gereja, 80100 Johor Bahru ("hereinafter called Customer") at my/our request or as long as you may at your sole discretion deem I/We Chua Kok It (NRIC No. S0241692A), Lai Yook Fong (NRIC No S1781631D), Chua Wee Hua (Cai Weihua) (NRIC S7719475D), Soon Tin Tin (NRIC No 00901-01-5388) and Supermaniam A/L Selitan (NRIC No 690614-0105319/ A1515555) the undersigned **hereby jointly and severally agree with and guarantee** you as follows, that is to say:

1. I/We will pay on demand

(i) All moneys which now are or may during the operation of this Guarantee be owing to you from the Customer or remain unpaid on the general balance of the Customer's account with you anywhere and on any account what so over whether from the Customer alone or from the Customer jointly with or as surety for any other person.

A …

28.1(a) In the event that I/we am/are residence(s) of Malaysia, I/we shall unless otherwise instructed by you in writing, pay to you all monies and satisfy all liabilities hereunder in Ringgit Malaysia.

B (b) If pursuant to Clause 28.1(a) hereof … or pursuant to a judgment or order being made or registered against the Customer … I/we shall as a separate and independent obligation, **jointly and severally indemnify** and hold harmless you against the amount of such shortfall …

(emphasis added)

C **[14]** Since the judgment was predicated upon the letter of guarantee, the cases that are applicable to the facts of the present case are *Alliance Bank Malaysia Bhd v. Mukhriz Mahathir & Anor* [2006] 2 CLJ 723 and *Re: Abu Bakar Ismail; Ex-Parte: Alliance Investment Bank Bhd* [2011] 1 LNS 1688, in which it was stated in the former case by Ramly Ali J (as he then was)

D The words "jointly and severally" is defined as "persons who are jointly and severally bound render themselves liable not only to a joint action against them, but also to a separate actions against them individually." (see: *A Dictionary of Law L.B. Curzon.*

E When the letters of guarantee provide for 'joint and several' liability what they meant is that the plaintiff has a cause of action against both the defendants as guarantors not only to a joint action against them but also to separate action against them individually. In such situation, the plaintiff can proceed with one action against both of them at the same time or 2 separate actions against both of them individually.

F **[15]** In interpreting the words "jointly and severally" in the letter of guarantee, I drew guidance from *Re: Abu Bakar Ismail; Ex-Parte: Alliance Investment Bank Bhd* [2011] 1 LNS 1688, where it was stated by Lee Swee Seng JC (now JCA):

G The stress in the word "jointly" simply means that the JDs are jointly as in collectively liable for the whole judgment sum. Irrespective of their contribution to the judgment sum, finally the sum claimed cannot exceed the judgment sum. It cannot be made susceptible to the single meaning that each of the 4 JDs is liable only for 1/4 of his share of the judgment sum. It simply means that together and collectively all the 4 JDs are liable for an amount not exceeding the judgment sum. It does not yield to the meaning of equitable or equal division or distribution of the liability. If it

H were so then it should be clearly stated that each Defendant shall pay his equal portion of the judgment debt as in the judgment sum divided equally by the 4 JDs.

I

Likewise the stress on "severally" simply means that each one of the 4 JDs may be made liable for the whole of the judgment sum. The JC may proceed against any one of the 4 JDs alone and that JD would have no right to complain. The stress is on the fact that singly or severally each can be made solely and sorely liable be it ever so severely for the full judgment sum. Little wonder that the expression "jointly and severally" is used together to bring in the full meaning of "collectively and individually" being liable for the debt. Thus when the words "jointly" and "severally" are combined together they produce so powerfully and potently the meaning as found in *Black Law Dictionary* (7th edition) when in defining joint and several liability as was quoted in *Lembaga Kumpulan Wang Simpanan Pekerja v. Suasana Kristal (M) Bhd & Ors* [2009] 8 CLJ 236 at page 241, it states as follows:

> A liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from non-paying parties.

[16] It is trite law that parties are bound by the terms of the agreement that they had entered into, as stated in a plethora of authorities including the Federal Court case of *Michael C Solle v. United Malayan Banking Corp Bhd* [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267, where it was elucidated by Hashim Yeop Sani FJ, in the following passage:

> The principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. **The intention of the parties are to be gathered from the language used. They are presumed to have intended what they said**. The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement.
>
> (emphasis added)

[17] In fact, it is a fundamental rule in the law of contract that it is not for the court to re-draft a contract which is entered freely between two contracting parties, or to read into a contract conditions that have not been inserted by the parties, or to omit terms which have been agreed to. This reminder was administered by Idrus Harun JCA in *OCBC Bank (Malaysia) Bhd v. Lim Hock Kok & Anor* [2017] 9 CLJ 454, in the following passage:

> ... if the court were to adopt that stance, contractual rights would be rendered illusory and it will have serious and far-reaching commercial consequences. The judicial authorities referred to above clearly show that it is imperative that contractual rights are recognised and enforced. **It is not for the courts to rewrite a contract or bargain made by the parties**. For there to be commercial efficacy and certainty, contractual terms

A agreed to by the parties should be enforced. Otherwise, it would result in chaos and commercial activities would grind to a halt if parties are not entitled to determine for themselves the rights and obligations to be given or assumed under a contract. We should emphasise that this is a logical and acceptable construction which parties ought to bring to bear upon a contract which they have agreed to enter into upon which terms they
B agree to be bound.

(emphasis added)

[18] The judgment debtor had further submitted that he was not aware that he had signed a letter of guarantee. However, it was my view that if the
C judgment debtor's grievance was against the judgment that was ordered against him, the proper redress would have been for him to apply to set aside the judgment, and not to resist the bankruptcy proceedings at this stage, in light of the fact that such proceedings were properly taken out against him. It has been stated in a plethora of authorities that it is not open to the judge
D in exercising his jurisdiction in bankruptcy proceedings "to strike out the creditor's petition by disputing the validity of orders made in earlier execution proceedings when the orders had not been set aside particularly so when the respondent had not at any time taken steps to have it set aside": per Lee Hun Hoe CJ (Borneo) in *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277.

E

[19] Reference on this point was made also to *Re: Tioh Ngee Heng; Ex p: Yap Kiu Lian @ Norhashimah Yap (Administratrix Of The Estate Of Mohamad Shariff Hj Hussain)* [2000] 1 LNS 197 and *Malayan Banking Bhd v. Datuk Lim Kheng Khim [1]* [1992] 3 CLJ 1449; [1992] 2 CLJ (Rep) 826, where it was
F stated in the former case by Steve Shim J (as he then was) in the following passage:

It should be noted that the issuance of a BN has to be founded upon a final judgment or a final order. This is reflected in s. 3(1)(i) Bankruptcy Act 1967, in particular the proviso therein. In the instant case, the consent order stipulates payment by the JD of a quantified sum of RM33,000 in
G instalments providing for payment of interest in the event of default. Clearly, it finally disposes the rights of the JC and the liability of the JD. It is therefore in the nature of a final order: (see *Haron bin Mohd Zaid v. Central Securities (Holdings) Bhd* [1982] CLJ 293; [1982] CLJ 26 (Rep); [1982] 2 MLJ 94). It is also significant to note that the consent order has
H not been set aside *nor has the JD taken any step to challenge it. It is trite law that an order, even if irregular, is valid and enforceable until set aside. This principle is particularly relevant in bankruptcy proceedings where the court generally will not look behind the judgments or order save in very limited circumstances of fraud or illegality, etc.*

(emphasis added)

I

[20] Since the judgment was never set aside and neither was there evidence of fraud, illegality or coercion, the argument that the judgment debtor was unaware of what he had signed is untenable.

Conclusion

[21] In the upshot, based on the aforesaid reasons, and after judicious consideration of all the evidence before this court, both oral and documentary, including submissions of both parties, I allowed this appeal with costs.